

**DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL
DIVISION OF FISH AND WILDLIFE**

Statutory Authority: 7 Delaware Code, Sections 901(b), (c) and (d); 903(a), (b) and (e)(2)b. (7 **Del.C.** §§901(b), (c) and (d); 903(a), (b) & (e)(2)b.)
7 **DE Admin. Code** 3503 & 3504

FINAL

Secretary's Order No: 2020-F-0024

RE: Approving Final Amendments to 7 DE Admin. Code 3503 - *Striped Bass Recreational Fishing Seasons; Methods of Take; Creel Limit; Possession Limit* and 7 DE Admin. Code 3504 - *Striped Bass Possession Size Limit; Exceptions*

Date of Issuance: July 15, 2020

Effective Date: August 11, 2020

**3503 Striped Bass Recreational Fishing Seasons; Methods of Take; Creel Limit; Possession Limit
3504 Striped Bass Possession Size Limit; Exceptions**

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") pursuant to 7 *Del.C.* §§6006 and 6010, and all other relevant statutory authority, the following findings of fact based on the record, reasons and conclusions are entered as an Order of the Secretary in the above-referenced regulatory proceeding.

Background, Procedural History and Findings of Fact

This Order relates to 7 **DE Admin. Code** 3503 - *Striped Bass Recreational Fishing Seasons; Methods of Take; Creel Limit; Possession Limit* and 7 **DE Admin. Code** 3504 - *Striped Bass Possession Size Limit; Exceptions* ("Amendments"). The Department proposes revisions for Delaware to remain compliant with Addendum VI to Amendment 6 of the Atlantic States Marine Fisheries Commission's ("ASMFC") Fishery Management Plan ("FMP") for Atlantic Striped Bass ("Addendum"). The proposed Amendments, as required by the aforementioned Addendum, would enact an 18% reduction of Striped Bass removals for proper management of this species.

In 2018, the ASMFC conducted a benchmark stock assessment of Striped Bass. The assessment indicated that the striped bass stock is overfished and experiencing overfishing. In October 2019, the ASMFC's striped Bass Management Board implemented Addendum VI to Amendment 6 of the FMP, in order to retain management measures for the striped bass population. The mandatory provisions of the Addendum require a coastwide 18% reduction in striped bass removals (landings + discard mortality). The ASMFC adopted specific, prescribed coastwide management measures to meet the required 18% reduction, however these measures are not preferred for Delaware.

The Department then developed two management alternatives for the review of the ASMFC. One alternative (Option 1) provides a recreational possession limit of one striped bass and an allowable striped bass size limit of not less than 28-inches or more than 35-inches in total length; except, in the Delaware Bay, Delaware River and their tributaries during July and August, the allowable size limit is not less than 20-inches or greater than 25-inches. Delaware's authorized commercial striped bass quota is established as 142,474 pounds. The result of Option 1 measures a 1.8% reduction in commercial removals and a 20.4% reduction in recreational removals.

The other alternative (Option 2) provides a recreational possession limit of one striped bass and an allowable striped bass size limit of not less than 28-inches or more than 38-inches in total length; except, in the Delaware Bay, Delaware River and their tributaries during July and August, the allowable size limit is not less than 20-inches or greater than 25-inches. Delaware's authorized commercial striped bass quota would be 118,969 pounds. The result of Option 2 measures an 18% reduction in commercial removals and an 18.18% reduction in recreational removals.

The ASMFC's Striped Bass Management Board approved both alternatives for use at their February 4, 2020 meeting; however, there was insufficient time to promulgate regulations for either alternative through standard administrative procedures by the required April 1, 2020 implementation date. There was also a need to implement management measures by the February 15, 2020 opening of Delaware's commercial striped bass fishery to avoid jeopardizing the welfare of the striped bass resource and its dependent commercial and recreational fisheries.

In accordance with the procedures set forth in 29 *Del.C.* §10119 and pursuant to 7 *Del.C.* §903(h), the Department implemented Emergency Order No. 2020-F-0002 ("EO") on February 12, 2020. The EO enacted measures to adopt Option 1 management alternatives that were preferred by Delaware's Advisory Council on Tidal Finfisheries until both alternatives were vetted through the standard administrative procedures. The EO went into effect on February 15, 2020, thereby

meeting the opening date of Delaware's commercial striped bass fisheries to ensure the welfare of the striped bass resource and its dependent commercial and recreational fisheries. Compliant with the Addendum, the EO was expected to reduce Delaware's total striped bass removals by 18.4%.

The EO remained in effect for 120 days, expiring June 14, 2020. Pursuant to 29 *Del.C.* §10119(3) the Department renewed the EO for an additional 60 days through Secretary's Order No. 2020-F-0016 (expiring August 14, 2020), in order to retain its provisions while the amendments were being finalized pursuant to the Administrative Procedures Act.

It should be noted that the emergency regulations, as contained in the EO and its' extension, were intended as interim measures, necessary to avoid the risk of harm to public health, safety, and welfare, pending the formal adoption of regulations pursuant to the Administrative Procedures Act.

The Department has the statutory basis and legal authority to act with regard to the formal promulgation of these proposed Amendments, pursuant to 7 *Del.C.* §901 (b), (c) & (d); §903 (a), (b) & (e)(2) b. The Department published its initial proposed regulation Amendments in the June 1, 2020 *Delaware Register of Regulations*. Pursuant to the State of Emergency declared by Governor Carney, dated March 13, 2020, the State of Emergency mandated all public meetings of executive branch public bodies governed by 29 *Del. C.* §§10001 et. seq. to be conducted electronically, either by means of telephone conference call or video-conference call, to prevent unnecessary public gatherings due to the public threat of COVID-19. A virtual public hearing regarding this matter was held on June 25, 2020 via the Webex virtual platform. There were 2 members of the public in attendance at the virtual public hearing.

Pursuant to 29 *Del.C.* §10118(a), the hearing record ("Record") remained open for receipt of written comment for 15 days following the virtual public hearing. The Record formally closed for comment in this matter, at close of business on July 10, 2020, with 4 written comments received by the Department for the formal promulgation.

It should be noted that all notification and noticing requirements concerning this matter were met by the Department. Proper notice of the hearing was provided as required by law.

Subsequent to the close of the Record, and at the request of presiding Hearing Officer Theresa Newman, the Department's Division of Fish and Wildlife staff prepared a Technical Response Memorandum ("TRM"). The TRM responds to the comments received by the Department in this matter and provides a thorough discussion with regard to concerns of the Striped Bass population and the impact to recreational and commercial fisheries.

The Department's experts in the Division of Fish and Wildlife have concluded that Option 1 reduces the financial impact of the proposed Amendments to commercial fishermen. Option 1 also retains recreational size, season and possession limits that are either identical or close to the recreational regulations of our surrounding states, such that recreational fisheries are not at a competitive disadvantage. In addition, the Delaware's Advisory Council on Tidal Finfisheries, comprised of equal numbers of commercial and recreational councilors, recommended that the Department implement Option 1 at their November 20, 2019 meeting.

Following receipt of the Department's TRM as noted above, the Hearing Officer prepared her Hearing Officer's Report dated June 13, 2020 ("Report"), which expressly incorporated both the Department's proposed Amendments and the TRM into the Record generated in this matter. The Report documents the proper completion of the required regulatory amendment process, establishes the Record, and recommends the adoption of the aforementioned Amendments to 7 **DE Admin. Code** 3504, as attached to the Report as Appendix "A," and as set forth in Option 1 previously referenced herein.

Reasons and Conclusions

Based on the Record developed by the Department's experts in the Division of Fish and Wildlife, and established by the Hearing Officer's Report, I find that the proposed regulatory Amendments are well-supported. I further find that the Department's experts fully developed the record to support adoption of these Amendments. Therefore, the recommendations of the Hearing Officer are hereby adopted, and I direct that the proposed Amendments be promulgated as final.

The following reasons and conclusions are entered:

1. The Department has the statutory basis and legal authority to act with regard to this proposed regulatory promulgation, pursuant to 7 *Del.C.* §901 (b), (c) & (d); §903 (a), (b) & (e)(2) b;
2. The Department has jurisdiction under its statutory authority, pursuant to 7 *Del.C.* Chapter 60, to issue an Order adopting these proposed Amendments as final;
3. The Department provided adequate public notice of the initial proposed Amendments and all proceedings in a manner required by the law and regulations, and provided the public with an adequate opportunity to comment on the same, including at the time of the public hearing held on June 25, 2020, and during the 15 days subsequent to the hearing (through July 10, 2020), before making any final decision;
4. Promulgation of the proposed Amendments to 7 **DE Admin. Code** 3503 - *Striped Bass Recreational Fishing Seasons; Methods of Take; Creel Limit; Possession Limit* and 7 **DE Admin. Code** 3504 - *Striped Bass Possession Size Limit; Exceptions*, will enable the Department to remain compliant with Addendum VI to Amendment 6 of the Atlantic States Marine Fisheries Commission's Fishery Management Plan for Atlantic Striped Bass. The proposed Amendments, as required by the aforementioned Addendum, would enact an 18% reduction of striped bass

removals for proper management of this species;

- 5. The Department has reviewed the proposed Amendments in light of the Regulatory Flexibility Act, consistent with 29 *Del.C.* Ch. 104, and believes the same to be lawful, feasible and desirable, and the recommendations as proposed should be applicable to all Delaware citizens equally;
- 6. The Department's proposed regulatory Amendments, as initially published in the June 1, 2020 *Delaware Register of Regulations*, and as set forth in Appendix "A" hereto, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, they should be approved as final regulatory Amendments, which shall go into effect ten days after their publication in the next available issue of the *Delaware Register of Regulations*; and
- 7. The Department shall submit the proposed Amendments as final regulatory amendments to the *Delaware Register of Regulations* for publication in its next available issue and provide such other notice as the law and regulation require, and the Department determines is appropriate.

Shawn M. Garvin
Secretary

**3500 Tidal Finfish
Bass (Striped Bass; Black Sea Bass)**

3503 Striped Bass Recreational Fishing Seasons; Methods of Take; Creel Limit; Possession Limit.

(Penalty Section 7 *Del.C.* §936(b)(2))

- 1.0 It is lawful for any person to take and reduce to possession striped bass from the tidal waters of this State at any time except as otherwise set forth in this regulation or in Tidal Finfish Regulations 3502 and 3504.
- 2.0 It is unlawful for any recreational fisherman to take or attempt to take any striped bass from the tidal waters of this State with any fishing equipment other than a hook and line or a spear while said recreational fisherman using the spear is underwater. Recreational gill net permittees are not authorized to take and reduce to possession any striped bass in gill nets.
- 3.0 Unless otherwise authorized, it is unlawful for any recreational fisherman to take and reduce to possession more than ~~two (2)~~ one striped bass per day (a day being 24 hours) from the tidal waters of this State. Any striped bass taken from the tidal waters of this State that is not immediately returned, without unnecessary injury, to the same waters from which it was taken, is deemed taken and reduced to possession for purposes of this subsection.
- 4.0 Unless otherwise authorized, it is unlawful for any recreational fisherman to have in possession more than ~~two (2)~~ one striped bass at or between the place said striped bass was taken and said fisherman's personal abode or temporary or transient place of lodging.
- 5.0 Notwithstanding 7 *Del.C.* §943, which only relates to commercial fishermen, it is lawful for a recreational fisherman to possess striped bass that have not been tagged, unless otherwise prohibited.

7 DE Reg. 1205 (03/01/04)
18 DE Reg. 889 (05/01/15)
20 DE Reg. 467 (12/01/16)

3504 Striped Bass Possession Size Limit; Exceptions.

(Penalty Section 7 *Del.C.* §936(b)(2))

- 1.0 Notwithstanding, the provisions of 7 *Del.C.* §929(b)(1), it is unlawful for any recreational fisherman to take and reduce to possession any striped bass that measures less than ~~twenty-eight (28)~~ 28 inches in total length or any striped bass that measures greater than ~~thirty-seven (37) or equal to~~ [[TBD from Table] 35] inches in total length ~~but less than forty-four (44) inches in total length~~, except that a recreational hook and line fisherman may only take ~~two (2)~~ one striped bass measuring not less than ~~twenty (20)~~ 20 inches in total length and not greater than ~~twenty-five (25)~~ 25 inches in total length from the Delaware River, Delaware Bay, or their tributaries during the months of July and August.

Table. Legal recreational striped bass lengths options in proposed amendments to 7 DE Admin. Code §3504 (1.0).

<u>Option</u>	<u>Minimum Length (inches)</u>	<u>Length not to be equaled or exceeded (inches)</u>
<u>1</u>	<u>28</u>	<u>35</u>
<u>2</u>	<u>28</u>	<u>38</u>

- 1
- 2.0 Notwithstanding, the provisions of 7 Del.C. §929(b)(1), it is unlawful for any commercial food fisherman to take and reduce to possession any striped bass that measure less than ~~twenty-eight (28)~~ 28 inches in total length from the tidal waters of this State except that commercial gill net fishermen may take striped bass measuring no less than ~~twenty (20)~~ 20 inches in total length from the tidal waters of the Delaware River and Delaware Bay or their tributaries during the period from February 15 through May 31 or from the tidal waters of the Nanticoke River or its tributaries during the period from February 15 through ~~the month of March~~ 31.
- 3.0 It is unlawful for any person to possess a striped bass except in accordance with Section 1.0 or 2.0 of this section or unless said striped bass is in one or more of the following categories:
- 3.1 It has affixed a valid strap tag issued by the Department to a commercial food fisherman and was legally taken and tagged by said commercial food fisherman; or
 - 3.2 It was legally landed in another state for commercial purposes and has affixed a valid tag issued by said state's marine fishery authority; or
 - 3.3 It entered Delaware packed or contained for shipment, either fresh or frozen, and accompanied by a bill-of-lading with a destination to a state other than Delaware; or
 - 3.4 It was legally taken and reduced to possession in another state for noncommercial purposes by the person in possession of said striped bass and there is affixed to either the striped bass or the container in which the striped bass is contained a tag that depicts the name and address of the person landing said striped bass and the date, location, and state in which said striped bass was landed; or
 - 3.5 It is the product of a legal aquaculture operation and the person in possession has a written bill of sale or receipt for said striped bass.
- 4.0 It is unlawful for any commercial finfisherman to possess any striped bass for which the total length has been altered in any way prior to selling, trading or bartering said striped bass.
- 5.0 The words "land" and "landed" shall mean to put or cause to go on shore from a vessel.
- 6.0 The words "take and reduce to possession" shall mean the removal of any striped bass from Delaware waters with the intent to keep or harvest the striped bass.
- 7.0 It is unlawful for a commercial finfisherman authorized to fish during Delaware's commercial striped bass fishery to land any striped bass that measures less than ~~twenty (20)~~ 20 inches in total length.

3 DE Reg. 1088 (02/01/00)

4 DE Reg. 230 (07/01/00)

4 DE Reg. 1552 (03/01/01)

6 DE Reg. 1512 (05/01/01)

7 DE Reg. 1205 (03/01/04)

8 DE Reg. 1718 (06/01/05)

12 DE Reg. 1228 (03/01/09)

18 DE Reg. 889 (05/01/15)

20 DE Reg. 467 (12/01/16)

24 DE Reg. 175 (08/01/20) (Final)